

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP507

Cir. Ct. No. 2014CV210

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WELLS FARGO BANK, N.A.,

PLAINTIFF-RESPONDENT,

V.

BRIAN D. UDEAN,

DEFENDANT,

KATHLEEN M. UDEAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County:
GEORGE L. GLONEK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kathleen Udean appeals a summary judgment reforming an earlier foreclosure judgment to correct an error in the legal description of the property. She argues: (1) the terms of the mortgage were unambiguous and satisfied the requirements of WIS. STAT. § 706.02(1) (2015-16),¹ and, as a result, there is no legal basis for reformation; (2) summary judgment was inappropriate because there are outstanding issues of material fact regarding mutual mistake;² and (3) the court should have stricken the affidavit of Savannah Witte because it was not based on personal knowledge and contained hearsay. We reject these arguments and affirm the judgment.

¶2 In 1990, Udean's former husband, now deceased, purchased several parcels of land used to secure a mortgage from Superior Community Credit Union (SCCU). That mortgage contained the proper legal description of all of the property. After their marriage in 1991, the Udeans entered into several other mortgages secured by the same real estate on which they had constructed a residence. Those mortgages contained an inaccurate legal description, which included the parcel on which a driveway is located, but not the Udean's residence and other improvements. In 2007, the Udeans executed a note to North American Savings Bank, secured by a mortgage with the inaccurate property description. The loan application, title report, appraisal and other loan origination documents,

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Citing *Chandelle Enterprises LLC v. XLNT Dairy Farms, Inc.*, 2005 WI App 110, 282 Wis. 2d 806, 699 N.W.2d 241, Udean argues that a party intervening after the transaction who was not an original party to the instrument cannot bring a claim for reformation based upon mutual mistake. *Chandelle* prohibits reformation that interferes with the rights of innocent third parties. *Id.*, ¶18. It does not preclude an intervening party that was not an original party to the instrument from bringing a reformation claim based on mutual mistake.

as well as the mortgage itself, all show the mortgage was intended to also cover the Udean's residence.

¶3 Wells Fargo, the assignee of the North American Savings Bank, brought this foreclosure action. The Udeans defaulted, and a sheriff's sale was held and confirmed on the land described in the incorrect legal description. The SCCU mortgage was also foreclosed at the same time. Wells Fargo paid the SCCU debt, and the sheriff's sale on the SCCU foreclosure was canceled and that case was dismissed. When Wells Fargo discovered the incorrect legal description, it successfully moved to reopen the foreclosure judgment and amend the complaint, and it requested reformation of the legal description to include the entire property. Wells Fargo filed requests for admission, and Kathleen failed to timely respond to the requests. Wells Fargo moved for summary judgment, which the circuit court granted.

¶4 Udean's argument that the mortgage contains a complete legal description and complies with the statute of frauds, thus precluding any reformation, fails for several reasons. First, although the mortgage provided a legal description of property as required by WIS. STAT. § 706.02(1)(b), the legal description did not describe the land that was intended to be mortgaged. Because the mortgage itself and other contemporaneously executed documents show the parties' intent to mortgage the residence, the circuit court properly concluded the legal description in the mortgage failed to identify the land the parties intended to encumber by the mortgage. WISCONSIN STAT. § 706.04(1) and (2) do not preclude a court from reforming the mortgage to reflect the parties' intent. Second, the court had authority to reform the mortgage under its equitable powers based on mutual mistake under WIS. STAT. § 847.07. Noncompliance with the statute of frauds is not a prerequisite to that authority.

¶5 Udean contends there are material issues of fact regarding the parties' intent. Because she failed to timely respond to requests for admission, she is deemed to have admitted the mutual mistake. *See* WIS. STAT. § 804.11(b). Udean's affidavit does not deny the parties' intent to mortgage the residence as well as the other property. Affidavits with attached documents filed by Wells Fargo clearly show the mortgage was intended to cover the residence. Contrary to Udean's argument, many of these origination documents are admissible admissions of a party opponent. *See* WIS. STAT. § 908.01(4)(b). Other documents are records affecting an interest in property and were admissible under WIS. STAT. § 908.03(14).

¶6 Udean's argument that the Witte affidavit should have been stricken fails for two reasons. First, the affidavit merely verified the accuracy and authenticity of the records as allowed by WIS. STAT. § 909.015(1). Therefore, the affidavit and the documents it authenticated were properly considered by the court. Second, the circuit court did not need to rely on the Witte affidavit because other affidavits and documents clearly show the parties' intent to include the residence in the mortgaged property and their mutual mistake regarding the legal description.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

